

programs under Executive Order 12549, "Debarment and Suspension." issued by the President of the United States on February 18, 1986.

(i) Program Income. For the purposes of this Agreement, "Program Income" shall include: (1) earnings from the use or rental of Real Property or personal property acquired with funds provided pursuant to the Compact, as amended; (2) the sale of commodities or items fabricated under a sector Grant; and (3) fees assessed in the areas of public utilities, health services and any other activities provided by government or government-owned enterprises that are supported by sector Grants.

(1) The Government of the Federated States of Micronesia shall seek opportunities to earn Program Income to defray government program costs and shall establish fees for services in the areas of public utilities, health services, and any other government-owned or operated enterprises to comply with the terms and conditions of certain sector Grants.

(2) Unless otherwise authorized by the Grant, Program Income shall remain with the programs in which they are earned, to offset Operational Costs and capital costs not covered by funds provided pursuant to the Compact, as amended.

(j) Procurement:

(1) The Government of the Federated States of Micronesia may use its own procedures for procurement, whether done by government or its Sub-Grantees, provided that they meet the standards identified in this section.

(2) The Government of the Federated States of Micronesia shall maintain a Contract administration system that ensures that contractors perform in accordance with the terms, conditions, and specifications of their Contracts or purchase orders.

(3) A written code of conduct shall be maintained by the Government of the Federated States of Micronesia to govern the performance of its employees engaged in the award and administration of contracts. No employee, officer, or agent of the Government of the Federated States of Micronesia shall participate in the selection, award, or administration of a Contract supported by funds provided pursuant to the Compact, as amended, if a conflict of interest, real or apparent, is involved.

(i) Officers, employees or agents shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to sub-agreements.

- (ii) The Government of the Federated States of Micronesia may set minimum rules where the financial interest is not substantial or the gift is unsolicited and of nominal intrinsic value.
  - (iii) To the extent permitted by law or regulations of the Government of the Federated States of Micronesia, the standards of conduct shall provide for penalties, sanctions, or other disciplinary actions for violations.
- (4) Awards shall be made only to contractors who possess the ability to perform responsibly and successfully under the terms and conditions of a proposed procurement. Selection must consider contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.
- (5) Records shall be maintained with sufficient detail to document the history of a procurement, including but not limited to the rationale for and method of procurement, the selection of Contract type, contractor selection or rejection, and the basis for the Contract price.
- (6) The Government of the Federated States of Micronesia shall use time and material type Contracts only after determining that no other Contract is suitable and if the Contract includes a ceiling price that the contractor exceeds at its own risk.
- (7) The Government of the Federated States of Micronesia shall be solely responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurement. These issues include but are not limited to source evaluation, protests, disputes, and claims.
- (8) The Government of the Federated States of Micronesia shall have protest procedures to handle and resolve procurement disputes.
- (9) Competition:
  - (i) All procurement transactions shall be conducted in a manner providing full and open competition. Some of the situations considered to be restrictive of competition include but are not limited to: (1) placing unreasonable requirements on firms in order for them to qualify to do business; (2) requiring unnecessary experience and excessive bonding; (3) noncompetitive pricing practices between firms or between affiliated companies; (4) making noncompetitive awards to consultants on retainer; (5) organizational conflicts of interest; (6) specifying a "brand

name" instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement; and (7) any arbitrary action in the procurement process.

- (ii) Geographic preferences shall be allowed only if its application leaves an appropriate number of qualified firms to compete in the contract, and if there is no discrimination against race, religion or national origin.
- (iii) Written selection procedures shall govern procurement. These procedures shall ensure that all solicitations incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurement, contain features that unduly restrict competition.
- (iv) The Government of the Federated States of Micronesia shall ensure that all pre-qualified lists of persons, firms, or products used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Potential bidders shall not be precluded from qualifying during the solicitation period.

(10) Methods of Procurement:

- (i) Procurement By Small Purchase Procedures. Small purchase procedures are those relatively simple and informal methods for securing services, Supplies, or other property that do not cost more than \$100,000. If small purchase procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.
- (ii) Procurement By Sealed Bids. Sealed bids are those bids that are publicly solicited for which a firm-fixed-price Contract is awarded to the lowest bidder who meets all the terms and conditions of the invitation. The sealed bid method is the preferred method for procuring construction, if the conditions of sub-clause (10)(iii) apply.
- (iii) The following conditions shall apply to sealed bidding: (1) a complete, adequate, and realistic specification or purchase description must be available; (2) two or more responsible bidders must be willing and able to compete effectively and for the business; (3) the procurement must lend itself to a firm fixed price contract; and (4) the selection of the successful bidder can be made principally on the basis of price.

- (iv) The following requirements shall apply if sealed bids are used: (1) the invitation for bids shall be publicly advertised, solicited from an adequate number of known suppliers, and provide bidders with sufficient time to respond; (2) the invitation shall include any specifications and pertinent attachments, and define the items or services to allow the bidder to properly respond; (3) all bids shall be publicly opened at the time and place prescribed in the invitation for bids; and (4) a firm fixed-price Contract award shall be made in writing to the lowest responsive and responsible bidder. Any or all bids may be rejected if there is a sound documented reason.
- (v) Procurement By Competitive Proposals. Competitive proposals are normally conducted when more than one source submits an offer for either a fixed-price or cost-reimbursement type contract, and when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements shall apply: (1) requests for proposals shall be publicized and identify all evaluation factors and their relative importance; (2) proposals shall be solicited from an adequate number of qualified sources; (3) the Government of the Federated States of Micronesia shall have a method for conducting technical evaluations of the proposals and for selecting awardees; and (4) awards shall be made to the firm whose proposal is most advantageous to the program. Competitive proposals may also be used when price is not a factor but only to procure architectural and engineering services. It cannot be used to purchase other types of services provided by architectural and engineering firms that are a potential source to perform the proposed effort.
- (vi) Procurement By Noncompetitive Proposals. Noncompetitive proposals are procurement through the solicitation of only one source or when competition is determined inadequate after soliciting a number of sources. This method shall be used only when the award of a Contract is infeasible under either procedures for small purchase, sealed bids or competitive proposals, and when one of the following circumstances applies: (1) the item is available only from a single source; (2) public exigency or emergency will not permit a delay resulting from competitive solicitation; or (3) competition is determined to be inadequate after the solicitation of a number of sources. Cost analysis shall be required to verify the proposed cost

data, the projections of the data, and the evaluation of the specific elements of costs and profits.

- (11) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(12) United States Review:

- (i) The Government of Federated States of Micronesia shall make available, upon request of the Government of the United States, technical specifications on proposed procurements.
  - (ii) The Government of Federated States of Micronesia shall make available, upon request of the Government of the United States, pre-award procurement documents, including but not limited to requests for proposals or invitations for bids and independent cost estimates, when:  
(1) procurement procedures fail to comply with the standards set forth in this section; (2) the procurement is expected to exceed \$100,000 and is to be awarded without competition or only one bid or offer is received in response to a solicitation; (3) the proposed award is more than \$100,000 and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or (4) a proposed Contract modification changes the scope of a Contract or increases the Contract amount by more than \$100,000.
- (13) Bonding Requirements. For construction or facility improvement Contracts or sub-Contracts exceeding \$100,000, the Government of the United States may accept the bonding policy and requirements of the Grantee or Sub-Grantee provided the United States determines that its interests are adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:
- (i) Bid Guarantee. Each bidder shall guarantee an equivalent of five percent of the bid price pursuant to a bid guarantee that complies with the requirements of this clause (i). The bid guarantee shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying the bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.
  - (ii) Performance Bond. The contractor shall execute a Performance Bond for one hundred percent of the Contract price. A Performance Bond is one executed in connection

with a Contract to secure fulfillment of all the contractor's obligations under such contract.

- (iii) Payment Bond. The contractor shall execute a Payment Bond for one hundred percent of the Contract price. A Payment Bond is one executed in connection with a Contract to assure the lawful payment of all persons supplying labor and material in the execution of the contract.

- (14) Contract Provisions. All Contracts paid with funds provided pursuant to the Compact, as amended, shall contain the following provisions:

- (i) For Contracts in excess of \$100,000: administrative, contractual, or legal remedies in instances where contractors violate or breach Contract terms, and the provision of such sanctions and penalties as appropriate;

- (ii) For Contracts in excess of \$100,000: Termination for cause and for convenience by the Grantee or Sub-Grantee including the manner by which it will be effected and the basis for settlement;

- (iii) Compliance with the local statutes regarding kickbacks and corrupt practices;

- (iv) Access by the Government of the Federated States of Micronesia and its Sub-Grantees, the Government of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific Contract for the purpose of making audit, examination, excerpts, and transcriptions;

- (v) Retention of all required records for three years after Grantees or Sub-Grantees make final payments and all other pending matters are closed; and

- (vi) Compliance with all applicable standards, orders, or requirements issued under local environmental laws.

- (k) Sub-Grants:

- (1) The Government of the Federated States of Micronesia will follow its laws and procedures when awarding and administering Sub-Grants. The Governments shall ensure that:

- (i) Every Sub-Grant includes any clauses required by the Compact, as amended, the sector Grant awards and this Agreement;

- (ii) Sub-Grantees are aware of requirements imposed upon them by the Compact, as amended, the sector Grant awards and this Agreement; and
- (iii) The Sub-Grantee can meet the financial management standards of this Agreement.

2. Program Monitoring, Performance Reports and Records Retention:

(a) Monitoring and reporting sector Grant program performance by the Government of the Federated States of Micronesia:

- (1) The Government of the Federated States of Micronesia shall be responsible for the management and monitoring of the day-to-day operations of all sector Grants and their activities, to assure compliance with all applicable Grant terms and conditions. Monitoring shall cover each program, function, or activity to ensure the achievement of performance goals.
- (2) The Government of the Federated States of Micronesia shall submit quarterly performance reports on each sector Grant. The reports shall be due 30 days after the reporting period.
- (3) The Government of the Federated States of Micronesia and the Government of the United States shall agree on a uniform format for performance reports. Performance reports for each Grant shall contain a summary of the following:
  - (i) A comparison of actual accomplishments to the objectives and indicators established for the period;
  - (ii) Any positive events that accelerate performance outcomes;
  - (iii) Any problems or issues encountered, reasons, and impact on Grant activities and performance measures;
  - (iv) Additional pertinent information including, when appropriate, an analysis and explanation of cost overruns.
- (4) The Government of the Federated States of Micronesia shall require performance reports from its Sub-Grantees.

(b) Construction Performance Reports. Unless otherwise agreed, the Government of the Federated States of Micronesia shall submit quarterly performance reports on each project funded pursuant to the Compact, as amended, to the Government of the United States.

(c) Significant Developments. Events may occur between the scheduled performance reporting dates that have significant impact upon a sector Grant supported activity. In such cases, the Government of the Federated States of

Micronesia shall immediately inform the Government of the United States when the following conditions arise:

- (1) Problems, delays, or adverse conditions that will materially impair the ability of the Government of the Federated States of Micronesia to meet the terms and conditions of the sector Grant. This disclosure must include a statement of the action taken or contemplated, and any assistance needed to resolve the situation.
- (2) Favorable developments that enable the meeting of time schedules and objectives sooner or at less cost than anticipated, or that produce more beneficial results than anticipated.

(d) The Government of the United States may make site visits as warranted by program needs.

(e) Waivers and Extensions:

- (1) The Government of the United States may waive any required performance report.
- (2) The Government of the Federated States of Micronesia may extend the due date for any performance report from a Sub-Grantee provided its reporting obligations to the Government of the United States are met.

(f) Frequency:

- (1) The Government of the United States may prescribe an alternative reporting frequency for a project or program. If no frequency is specified, the report shall be submitted annually.
- (2) A final report shall be required upon the completion or termination of each infrastructure or capacity building sector project.

(g) Due Date:

- (1) When reports are required on a quarterly or semiannual basis, they shall be due 30 days after the reporting period. When required on an annual basis, they shall be due 90 days after the end of the Grant year.
- (2) Final reports shall be due 90 days after the completion or termination of each infrastructure or capacity building Grant project.

(h) Retention and Access Requirements for Records:

- (1) Applicability. This clause (h) applies to all financial and programmatic records, supporting documents, statistical records, and other records of the Government of the Federated States of



Micronesia or its Sub-Grantees which are required to be maintained by this Agreement, program regulations or the Grant agreement, or are otherwise considered as pertinent to program regulations or the Grant agreement. Records of contractors or subcontractors are exempt from the requirements of this clause (h).

- (2) Length of Retention. Except as otherwise provided, records must be retained for three years from the date the Government of the Federated States of Micronesia submits the final project report to the Government of the United States.
- (3) If any litigation, claim, negotiation, audit, or other action involving the records has been started before the expiration of the three-year period, the records shall be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular three-year period, whichever is later.
- (4) Access to Records of the Government of the Federated States of Micronesia and Its Sub-Grantees. The Government of the United States shall have the right of access to any pertinent books, documents, papers, or other records of the Government of the Federated States of Micronesia and its Sub-Grantees which are pertinent to the Grant, in order to make Audits, examinations, excerpts, and transcripts.

3. Enforcement:

(a) Remedies for Noncompliance. If the Government of the Federated States of Micronesia or its Sub-Grantee materially fails to comply with any term or condition relating to records retention or to the reporting on and monitoring of a sector Grant during the course of the Grant year, the United States may take one or more of the following actions:

- (1) Temporarily withhold cash payments pending correction of the deficiency by the Government of the Federated States of Micronesia.
- (2) Disallow the use of funds provided pursuant to the Compact, as amended, and Matching credit for all or part of the activity or action not in compliance.
- (3) Wholly or partly suspend or terminate the current award.
- (4) Take other remedies that may be legally available.

(b) Hearings and Appeals. In taking an enforcement action, the Government of the United States will provide the Government of the Federated States of Micronesia an opportunity to a hearing, Appeal, or other administrative proceeding to which it is entitled under this Agreement.

(c) Effects of Suspension and Termination. The Government of the Federated States of Micronesia shall not obligate funds during a Suspension or after Termination of an award unless expressly authorized by the Government of the United States. Costs which are necessary and reasonably unavoidable are allowable if:

- (1) The costs result from Obligations that were properly incurred before the effective date of Suspension or Termination, are not in anticipation of it, and, in the case of a Termination, are non-cancelable.
- (2) The costs otherwise would be allowed if the award were not suspended or expired normally at the end of the funding period in which the Termination takes effect.

## **Article VII**

### **Terms and Conditions of Infrastructure Assistance**

1. Infrastructure Grants shall be subject to all laws and regulations governing the use of Grant funds provided by the Government of the United States to the extent these apply to this Agreement. Grant funds may not be used for any purpose other than for which they are offered.
2. Draw downs for reimbursement of actual or Accrued Expenditures shall be accomplished using a format provided by the Government of the United States or as mutually agreed.
3. Prior to the draw down of funds, the Government of the Federated States of Micronesia shall provide the following documentation to the Government of the United States:
  - (a) Evidence of title, leasehold agreement, or other legal authority for use of the land upon which the capital improvement project(s) is to be constructed.
  - (b) A detailed project budget for each capital development project. The budget shall include a breakdown of costs (in-house and contracts) for planning, engineering and design, real estate costs, supervision and administration, construction, and construction management and inspection. The Government of the Federated States of Micronesia and the Government of the United States shall mutually agree to the format of this submission.
  - (c) A scope of work that describes the work to be performed and the schedule from planning through completion of construction. A certified professional engineer or architect shall sign both the scope of work and budget for each construction project.
4. Prior to the draw down of funds for actual project construction, the Government of the United States may request to review the set of construction plans and specifications, a revised detailed cost estimate, and a detailed construction schedule.

5. All Grant monies shall remain available until expended, unless otherwise provided in this Agreement.

6. Failure to comply with program objectives, terms and conditions, or reporting requirements may result in the Suspension of Grant payments until the deficiency is corrected.

7. Infrastructure Maintenance Fund. Five percent of the annual public infrastructure Grant shall be set aside, with an equal contribution from the Government of the Federated States of Micronesia, as a contribution to an infrastructure maintenance fund to be established, maintained and utilized pursuant to the terms and conditions of this section 7 (the "IMF"). The Government of the Federated States of Micronesia may also allocate additional amounts from the health and education sector Grants to fund the maintenance requirements of those sectors.

(a) The funds shall be deposited in an operations and maintenance assistance account established by the Government of the Federated States of Micronesia, as matching contributions are received from the National Government and its Sub-Grantees. The Government of the Federated States of Micronesia may choose to advance matching contributions in advance of any specific contributions by individual Sub-Grantees.

(b) The Government of the United States shall deposit its contribution upon: certification by the Government of the Federated States of Micronesia that local Matching funds have been deposited or upon receipt of a deposit schedule and, beginning in Fiscal Year 2005, an annual financial report from the previous year showing the deposits of both the Government of the United States and the Government of the Federated States of Micronesia, the amount of income generated during the Fiscal Year, and the fund balance.

(c) The IMF shall be available for use following the annual transmittal of an infrastructure maintenance plan by the Government of the Federated States of Micronesia for concurrence in writing by the Government of the United States.

8. Reporting Requirements:

(a) A Standard Form SF 269 or a reasonable facsimile thereof approved by the Government of the United States, shall be prepared quarterly and submitted within 30 days after the end of the quarter to which it applies. The report shall include accounting information and a status of progress for each project funded by the Grant.

(b) A Federal Cash Transactions Report, or Standard Form SF 272 of the Government of the United States or a reasonable facsimile thereof approved by the Government of the United States, shall be submitted quarterly within 30 days of the end of the quarter to which it applies. Actual dates, project identification, and amounts of draw downs for the quarter should be supplied in the "Remarks" section of the form.

Article VIII  
Audit

1. Standards and Scope of Audit Authority of the Government of the United States:

Audit officials or agents of the Government of the United States, acting pursuant to and in accordance with section 232 of the Compact, as amended, may perform Audits on the use of all funding provided pursuant to the Compact, as amended, including Grants, programs and services, and other assistance provided to the Government of the Federated States of Micronesia. The Government of the United States is responsible for all costs attendant to the discharge of this authority.

2. Audit Responsibility of the Government of the Federated States of Micronesia:

(a) A financial and compliance audit, within the meaning of the Single Audit Act, as amended (31 U.S.C. 7501 et seq.), of the uses of the funding provided pursuant to the Compact, as amended, by the Government of the Federated States of Micronesia, shall be performed for each Fiscal Year during which Title Two of the Compact, as amended, is in effect. The results of these Audits shall be available not later than the beginning of the third fiscal quarter following the end of the Fiscal Year under review.

(b) For purposes of these Audits, the laws and regulations of the United States shall apply which are relevant to the Original Compact and Compact, as amended, related agreements, and such other instruments as may be made expressly applicable pursuant to mutual agreement by the Government of the United States and the Government of the Federated States of Micronesia. In general, the applicable laws and regulations are those promulgated under the authority, and at the discretion, of the Government of the Federated States of Micronesia and which relate in a material, substantial or direct way to that Government's financial statements and operations.

(c) The authority of the Government of the United States set forth in section 232 of the Compact, as amended, and this Article shall continue for at least three years after the last Grant or element of assistance by the Government of the United States has been provided and expended.

3. Audit Officials:

(a) Audit officials from the Government of the United States are the officials and employees of the Government of the United States who are responsible for the discharge of its audit responsibilities, including those of the Comptroller General of the United States and any Inspector General of an agency of the Government of the United States with programs operating in or otherwise serving the Federated States of Micronesia. While present in the Federated States of Micronesia for the purposes of this Agreement, audit officials from the Government of the United States shall be immune from civil and criminal process relating to words spoken or written and all acts performed by them in their official capacity and falling within their functions, except insofar as such immunity may